Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
CITY OF BURLESON, TEXAS	)	File No. 0002909663
	)	
Request for Waiver of Section 90.311(a)(2) of the Commission's Rules	)	

ORDER

Adopted: September 28, 2009 **Released: September 28, 2009**

By the Chief, Policy Division, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. The City of Burleson, Texas (Burleson) filed an application and request for waiver of Section 90.311(a)(2) of the Commission's rules[1] to operate a public safety radio system on three frequency pairs in the 470-512 MHz band, two of which are designated for non-public safety use.[2] For the reasons stated below, we grant the Waiver Request.

II. BACKGROUND

2. Burleson is located in the Dallas/Fort Worth, Texas urbanized area[3] and "has received funding approval to construct and operate an interoperable radio communications system to replace individual systems used by police, fire, emergency services, and other city services."[4] The 470-512 MHz band is allocated for land mobile radio use on a geographically shared basis with TV broadcast stations in thirteen urban areas in the United States, including Dallas/Fort Worth.[5] Burleson seeks authority to operate three frequency pairs in the 470-512 MHz band: 482/485.5250 MHz, 482/485.5500 MHz, and 482/485.6500 MHz.[6] In connection with its application, Burleson seeks waiver of Section 90.311(a)(2) "to permit inter-category sharing of frequencies not currently allotted to the Public Safety Pool in the TV [s]haring allocations for the Dallas/Fort Worth Metropolitan area."[7] This rule section provides that "[i]f assigned, subsequent authorizations [of frequencies in the 450-512 MHz band] will only be granted to users from the same category," and "[i]f unassigned, … it will be treated as available in the General Access Pool."[8]

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[1] 47 C.F.R. § 90.311(a)(2).

[2] File No. 0002909663 (filed Feb. 12, 2007, as amended April 3, 2007, March 6, 2008); and accompanying Request for Waiver (Waiver Request).

[3] *See* 47 C.F.R. §§ 90.303(b), 90.305(a).

[4] Waiver Request at 1.

[5] *See* 47 C.F.R. §§ 90.301, 90.303(b).

[6] *See* File No. 0002909663.

[7] Waiver Request at 1.

[8] 47 C.F.R. § 90.311(a)(2).

3. At the time Burleson filed its application, all three frequency pairs requested by Burleson had been assigned in the Dallas/Ft. Worth urbanized area to other land mobile users in the Business category,[9] and thus were not available for reassignment to public safety entities in the area. Because Burleson plans to use the frequencies for public safety purposes, Burleson seeks waiver of Section 90.311(a)(2).[10] Alternatively, Burleson seeks relief under Section 337(c) of the Communications Act of 1934, as amended (the Act).[11]

4. Frequency pair 482/485.5500 MHz was assigned to Thomas K. Kurian, but the license was canceled on February 13, 2007.[12] Consequently, this frequency pair is no longer assigned to any entity on a primary basis in the Dallas/Fort Worth, Texas urbanized area and is available in the General Access Pool to any category of user, including public safety entities.[13] Thus, Burleson does not require a waiver to obtain authorization to use frequency pair 482/485.5500 MHz. Accordingly, we dismiss the request for waiver as moot with respect to this frequency pair, and we grant authority to use this frequency pair.

5. Frequency pair 482/485.5250 MHz is assigned to Business category licensee Azle Communications, LP;[14] and frequency pair 482/485.6500 MHz was assigned to Business category licensee Champion Communications Services, Inc., and is now assigned to FleetTalk Partners, Ltd.[15] The licenses are located 53.1 and 56.4 miles, respectively, from Burleson's site, and thus, Burleson asserts that "there is no co-channel station licensed in the FCC protected service area of 40 miles.[16] Under the Commission's rules, these frequency pairs are available for licensing at Burleson's location, albeit to Business category users only absent waiver relief, because Burleson's site is more than 40 miles from fully-loaded incumbent stations.[17]

6. Burleson seeks to build "a five channel trunked interoperable public safety system," but "[a]fter an extensive search for channels the City was only able to locate two channels in the existing public safety pools that would permit narrowband trunked operation."[18] In support of its contention that "[t]here is no other spectrum allotted to public safety services that is immediately available to satisfy this

[9] *See* 47 C.F.R. §§ 90.35(a), 90.311(a)(1)(iv).

[10] Waiver Request at 3.

[11] 47 U.S.C. § 337(c). *See* Waiver Request at 1, 3-4.

[12] Station WPWR859, Allen, Texas, the license for frequency pair 482/485.5500 MHz that was assigned to Thomas K. Kurian on January 13, 2003, canceled on February 13, 2007. *See* File No. 0002391014. The Commission's Wireless Telecommunications Bureau, Mobility Division subsequently affirmed the license cancellation. *See* Pappammal Wellington Kurian, *Order on Reconsideration*, 22 FCC Rcd 18660 (WTB MD 2007), *aff'd,* 24 FCC Rcd 4827 (WTB MD 2009).

[13] *See* 47 C.F.R. § 90.311(a)(1).

[14] *See* license for Station WQCC785, Azle Communications Solutions, LP, Denton, Texas, granted February 1, 2005.

[15] *See* license for Station WPVB757, Champion Communications Services, Inc. (Champion), Allen, Texas, granted June 13, 2002. On March 8, 2007, after Burleson filed its application, Champion assigned its authorization to FleetTalk Partners, Ltd. *See* File No. 0002925295.

[16] *See* Waiver Request, Appendix C at 3, 5.

[17] *See* 47 C.F.R. § 90.313(c).

[18] Waiver Request at 1. Burleson applied for the two public safety channels under a separate application. *See* File No. 0002883817 (filed Jan. 19, 2007), granted as Station WQGN641 on March 9, 2007.

public safety requirement," Burleson submitted the results of its frequency availability analysis in the 150-160, 450-470, 482-488, and 851-866 MHz bands.[19] Regarding the 700 MHz public safety band, Burleson initially argued that "the availability of the new 700 MHz band will not meet the time frame for the construction and operation of the City's new radio system."[20] Specifically, "[t]he uncertainty of analog TV and FCC consideration of 700 MHz rebanding cloud the availability of this spectrum for the future."[21] In a more recent filing, Burleson dates the origin of its system planning back to late 2004, when "the City embarked on a project to consolidate public safety communications with the goal of achieving full interoperability between first responders, both inter and intra city."[22] Burleson continues, "[t]he availability of 700 MHz was in question with the projected date of analog TV clearing at a (then) distant 2009, and 800 MHz including the NPSPAC was fully deployed such that no additional channels were available."[23] Burleson also avers that it "researched the NPSPAC [National Public Safety Planning Advisory Committee] and 806 MHz bands, but has not been able to identify any channels that meet FCC exclusivity requirements."[24]

7. Burleson states that it "chose to utilize the UHF band to be compatible with other public safety operations in the vicinity…"[25] Two UHF frequency bands, 450-470 MHz and 470-512 MHz, have frequencies designated for public safety use.[26] Burleson observes that "[f]requencies below 470 MHz are considered shared spectrum without any exclusivity rights assigned," and therefore "[t]he operation of a trunking system on these channels requires … the use of automatic lock-out operation."[27] Burleson argues that "[a] public safety trunked system can't operate with the uncertainty of lock-out depleting the frequency pool precisely at a time when the system is needed not only by the City, but by other public safety licensees who may be sharing this spectrum."[28] Further, Burleson avers, "[t]he search details show that attaining quasi-exclusivity through distance separation and contour overlay is equally as frustrating given the proximity of co-channel licensees."[29] Therefore, Burleson claims that "this segment [public safety frequency bands below 470 MHz] is unsuitable to build a new public safety system."[30]

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[19] *See* Waiver Request at 3; Appendix A. Because the Commission's rules do not support trunking in the 30-50 MHz public safety band (*see* 47 C.F.R. § 90.187, which establishes trunking in the bands between 150 and 512 MHz), we consider the 30-50 MHz Band to be unavailable for Burleson's requested public safety service use, *i.e.*, trunked operation.

[20] Waiver Request at 2.

[21] *Id.*

[22] Letter from Paul Cain, Deputy City Manager, City of Burleson, to Mr. Thomas Eng, Public Safety and Homeland Security Bureau, Federal Communications Commission (dated March 12, 2009) at 1 (Burleson March 2009 Letter).

[23] *Id*.

[24] Waiver Request at 2.

[25] Burleson March 2009 Letter at 1.

[26] *See* 47 C.F.R. § 90.20.

[27] Waiver Request at 1. By using the term "lock-out" in this context, we assume that Burleson is referencing the monitoring requirement that applies to all trunked systems except those that have exclusivity. *See* 47 C.F.R. § 90.187(b). If a non-exclusive, trunked user monitors a frequency and finds that there is another signal present on that frequency, the user is "locked out" from using the frequency at that moment.

[28] Waiver Request at 1-2.

[29] *Id*. at 2.

[30] *Id*.

8. Turning to the 470-512 MHz band, Burleson contends that "the regulatory method for determining the category of these channels is unique."[31] Burleson argues that "when exclusivity is attained, channels should be considered [available] as general access [as opposed to limited to the incumbent's category] at any point beyond a composite 40 mile exclusivity radius."[32] Burleson concludes, "[i]f an authorization can be attained without consideration of loading of the initial and subsequent licensees beyond 40 miles, we question why then should the licensee category extend beyond exclusivity."[33]

9. On January 8, 2008, the Bureau returned the application, requesting additional information that "can show that there is no alternative to seeking Business category frequencies."[34] The Bureau remarked that "several frequencies are listed as 'available' in the 450-470 MHz band search attached to the application."[35] The Bureau requested that Burleson "elaborate if it attempted to obtain written consent from affected licensees on frequencies below 470 MHz, in accordance with Section 90.187 of the Commission's rules."[36]

10. On March 6, 2008, Burleson amended its application with a response to the Return.[37] Burleson states that "the frequencies shown on the attachment to the application are indeed 'available' considering only co-channel existing licensees."[38] Burleson continues, "the adjacent channel operations that are still in the wideband (20 kHz occupied bandwidth) mode prevent the licensing on these channels."[39] Accordingly, Burleson states that it "is not attempting to license channels below 470 MHz, and as such did not attempt to obtain concurrence for trunking operations."[40] Burleson lists four methods to obtain exclusivity under Section 90.187(b), and states that it chooses "to license channels in the 470-512 MHz band that meet exclusivity distance requirements of [Section] 90.313 and will be loaded to have exclusive use of the frequencies in the service area."[41]

11. On December 18, 2008, Enterprise Wireless Alliance noted that "frequency pair 482/485.5875 MHz is currently available for assignment at the location proposed by Burleson" because

[31] *Id*.

[32] *Id*. at 2-3.

[33] *Id*. at 3.

[34] *See* File No. 0002909663, Notice of Return, Reference No. 4696078 (dated Jan. 8, 2008) (Return).

[35] *Id*. at 1. *See also* Waiver Request, Appendix A, Frequency Availability Searches (Searches).

[36] Return at 1.

[37] *See* File No. 0002909663, Response to Notice of Return (Response).

[38] *Id*. at 2.

[39] *Id*. In other words, the "available" channels in the 450-470 MHz band are affected by adjacent channel interference from wideband incumbent licensees. When an 11.25 kHz bandwidth system (such as Burleson) is separated in frequency by 12.5 kHz from a 20 kHz bandwidth system, their bandwidths overlap. Depending on geographic spacing and operating parameters such as power and antenna height, the systems may interfere with each other.

[40] Response at 1.

[41] *Id*. *See* 47 C.F.R. § 90.187(b)(1), which refers to 47 C.F.R. § 90.313.

the frequency pair is currently in the public safety category.[42] At the request of Bureau staff, on March 12, 2009, Burleson provided a response to explain why it could not integrate frequency pair 482/485.5875 MHz into its antenna configuration.[43] Specifically, Burleson stated that use of the frequency pair would result in 37.5 kilohertz or 62.5 kilohertz separation from other usable channels in Burleson's configuration.[44] Channel spacings of less than 100 kilohertz would require "inefficient, lower power use of channels, which is undesirable."[45] Burleson states that a "combiner spacing of 100 kHz, although not optimum, was considered the best scenario of all possible combiner combinations" and "was infinitely more cost effective than installing a third antenna system for a 5-channel system and allowed for higher operating ERPs for all channels in the combiner."[46] Burleson states that "[u]tilization of three transmit antennas will cause system degradation that may necessitate a second simulcast site to attain the same system coverage."[47] By contrast, Burleson states that the wider spacing enabled by use of the Business category channels in lieu of 482/485.5875 MHz "reduces the system losses due to close spacing, significantly eliminates intermodulation products, and results in a cleaner operating system."[48]

III. DISCUSSION

12. Section 1.925 states that to obtain a waiver of the Commission's rules, a petitioner must demonstrate either that: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the present case, and that a grant of the requested waiver would be in the public interest;[49] or (ii) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.[50] An applicant seeking a waiver faces a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver.[51] For the reasons discussed below, we find that Burleson's amended application presents unique or unusual factual circumstances, such that application of Section 90.311(a)(2) would be inequitable, unduly burdensome or contrary to the public interest, or that Burleson has no reasonable alternative.[52]

13. We have examined the 33 frequencies in the 450-470 MHz band identified in Burleson's frequency search as "available" because they have no co-channel incumbents within 50 miles of

[42] Letter from Andre F. Cote, Senior Vice President, Enterprise Wireless Alliance, to Mr. Scot Stone, Deputy Chief, Mobility Division, Wireless Telecommunications Bureau, and Mr. Tracy Simmons, Chief, Licensing Branch, Public Safety and Homeland Security Bureau (dated Dec. 18, 2008).

[43] *See* Burleson March 2009 Letter.

[44] *See id*. at 5.

[45] *Id*.

[46] *Id*.

[47] *Id*

[48] *Id*.

[49] *See* 47 C.F.R. § 1.925(b)(3)(i).

[50] *See* 47 C.F.R. § 1.925(b)(3)(ii).

[51] *WAIT Radio v. FCC*, 413 F.2d 1153, 1157 (D.C. Cir. 1969) (*WAIT Radio*), *aff'd*, 459 F.2d 1203 (1973), *cert. denied*, 409 U.S. 1027 (1972) (*citing Rio Grande Family Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968)); Birach Broad Corp., *Memorandum Opinion and Order*, 18 FCC Rcd 1414, 1415 (2003).

[52] *See* Response, Burleson March 2009 Letter.

Burleson's site,[53] as well as the list of wideband, adjacent-channel licenses provided in Burleson's response to the Bureau's Return Letter.[54] Based on the listed separation distances[55] and bandwidth overlap between the "available" frequencies and the wideband, adjacent channel licensees, our analysis indicates that licensing Burleson on any of the "available" frequencies would create the risk of harmful interference to incumbent operations. We therefore find that these frequencies are not reasonable alternatives for Burleson's proposed trunked system. For similar reasons, we also find that public safety category frequency pair 482/485.5875 MHz is not a reasonable alternative for Burleson's proposed system in lieu of one of the Business category frequency pairs. From an engineering standpoint, the narrower channel spacings of frequency pair 482/485.5875 MHz would require a configuration based on low power use of channels to avoid intermodulation interference, and therefore would not meet the requirements of the proposed communications system.[56] Moreover, in order to overcome purported system losses and intermodulation interference arising from the use of frequency pair 482/485.5875 MHz, Burleson would need to add a third antenna in the transmit system and a second simulcast site.[57] Based on the totality of these arguments, we do not find this frequency pair to be a reasonable alternative to the Business category channels sought by Burleson.

14. With regard to the availability of the 700 MHz band, Burleson states that it initiated its planning and determined its spectrum use requirements prior to December 2006.[58] Based on this assertion, we find that Burleson reasonably determined at that time that the availability of the 700 MHz band was too distant in the future to factor into its planning or to be considered as "available" spectrum.[59] Additionally, because the City selected the UHF solution for its planned system and had already built out part of its UHF system,[60] we find that it would be unreasonably burdensome for the City to attempt to make use of 700 MHz public safety spectrum at present without significantly altering and or delaying implementation of its system. However, given the recent June 12, 2009 DTV transition date,[61] we fully expect that current and future public safety applicants will take into account the availability of all public safety spectrum, including the 700 MHz band, in any spectrum planning efforts before seeking non-public safety spectrum. We otherwise accept Burleson's representations, based on its searches of the 150-160, 450-470,482-488, and 851-866 MHz bands, that it has no reasonable alternative in terms of public safety spectrum to meet its needs.

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[53] *See* Waiver Request, Appendix A.

[54] *See* Response at 4.

[55] *See id*.

[56] *See supra* para. 11.

[57] *Id*.

[58] *See supra* para. 6.

[59] *See* County of Los Angeles, California, *Order*, 23 FCC Rcd 18389, 18400 ¶ 12 (PSHSB 2008).

[60] *See* buildout records for Station WQGN641 on the Commission's Universal Licensing System, http://wireless.fcc.gov/uls.

[61] In the DTV Delay Act that was enacted on February 11, 2009, Congress extended the date for the completion of the nationwide DTV transition from February 17, 2009 to June 12, 2009. *See* DTV Delay Act, Pub. L. No.111-4, 123 Stat. 112 (2009). Accordingly, subject to the DTV Delay Act, the Commission extended the analog license terms and adjusted the construction permits for the full power television stations on February 13, 2009. *See* Implementation of the DTV Delay Act, MB Docket No. 09-17, *Report and Order and Sua Sponte Order on Reconsideration*, 24 FCC Rcd 1607 (2009).

15. Based on the foregoing, we find persuasive Burleson's statement that "firm application of the category rule (90.311(a)(2)) would result in a hardship to the public safety services of the City such that the procurement of an enhanced trunked interoperable radio system would not be possible."[62] In reaching this decision, we find that no interference issues would result from a grant of Burleson's application because Burleson is located more than 40 miles from any co-channel licensees,[63] consistent with the spacing requirement of Section 90.313. Accordingly, Burleson would be able to obtain exclusive use of its service area and to employ a trunked radio system compatible with other public safety operations in the vicinity.[64]

16. Further, we find that granting the requested relief serves the public interest. Burleson provides public safety functions through the provision of police, fire, medical, and emergency services.[65] Burleson states that it "provides the basic services of government to safeguard the health and welfare of the citizens, both resident and transient."[66] Burleson concludes, "[t]he establishment of one common communications system to provide for interoperation of the City services will enhance the ability to deliver these services with a more efficient and quicker response for service."[67] Given that the proposed system will consolidate communications from disparate radio systems[68] and will promote interagency communication, we find that the public interest is served by affording Burleson's public safety community access to the necessary spectrum to enable it to better protect the lives and property in its care.[69] In view of our conclusion that a waiver is warranted under Section 1.925(b)(3) of the Commission's rules, we need not address whether Burleson's waiver request should be granted under Section 337(c) of the Act.[70]

IV. CONCLUSION

17. For the reasons stated herein, we grant Burleson's request for waiver of Section 90.311(a)(2).

V. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.925(b)(3) of the Commission's rules, 47 C.F.R. § 1.925(b)(3), the Request for Waiver associated with the captioned application filed by the City of Burleson, Texas on February 12, 2007, as amended, IS GRANTED.

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[62] Waiver Request at 3.

[63] On frequency pair 482/485.5250 MHz, Station WQCC785 is located 53.1 miles away. On frequency 482.5500 MHz, there are no co-channel licensees in the Dallas/Fort Worth, Texas urbanized area. On frequency pair 482/485.6500 MHz, Station WPVB757 is located 56.4 miles away.

[64] *See* 47 C.F.R. §§ 90.187(b)(1), 90.313(c).

[65] Waiver Request at 3.

[66] *Id*.

[67] *Id*.

[68] *See supra* para. 2.

[69] *See*, *e.g.*, 47 U.S.C. § 151 (one of the Commission's over-arching purposes is to "promot[e] safety of life and property through the use of … radio communication.").

[70] *See* County of Granite, Montana, *Order*, 24 FCC Rcd 5704, 5711 ¶ 17 (PSHSB PD 2009).

19. IT IS FURTHER ORDERED that File No. 0002909663 SHALL BE PROCESSED consistent with this *Order* and the Commission's rules.

20. This action is taken under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Beers
Chief, Policy Division
Public Safety and Homeland Security Bureau